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JOHN T. FEY,

No. 337

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

ARTHUR PARISETTE CLARK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW:

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages 51-67. It is also Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on June 20, 1956 [R. 68;* also see Appendix B to this petition].

The final judgment of the Court of Appeals (denial of the seasonably filed Petition for Rehearing) was entered on July 23, 1956. [R. 69; also see Appendix C to this petition]. The petition for writ of certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U. S. C. The district court has jurisdiction under 18 U. S. C. §3231.

3. QUESTIONS PRESENTED AND HOW RAISED.

I.

The record shows that the armed forces induction ceremony did not follow the applicable regulations in that the only evidence on the subject (pp. 178U and 179U of the government's exhibit) shows that the selec-

*All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of Exhibit 1.

tee was given only one chance to submit to induction and was given no warning of the penalty. The regulation (SR 615-180-1) requires that *two* opportunities be given the selectee to refuse to submit to induction and that the second opportunity be preceded by a warning of the penalty.

The question presented is whether the requirements of the regulation are mandatory and whether proof of compliance is a burden of the prosecution. This point was raised by written motion for judgment of acquittal [T.R. 7], point one:

> "There is no evidence to show that defendant is guilty as charged in the indictment,"

and point two:

> "The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment."

II.

The record undisputably shows that on his second administrative appeal petitioner was deprived of *all* the "special" appellate procedures prescribed by Congress.

The questions presented here are whether a selective service registrant's claim, showing on its face that it is based on agnosticism, may be summarily "short-circuited" and second, whether in the life of a college student the passing of 23 months of time is alone a sufficient "new fact" to justify a reinvestigation of his attitude towards military service. Point 4 of the motion raised this question.

III.

The record shows that petitioner from the first asserted that he was a conscientious objector to participation in warfare but that he also stated he didn't believe in a "Supreme Being."

The law requires that a registrant establish that he believes in a Supreme Being.

The question presented is whether the law discriminates against religions that do not believe in a Supreme Being and against registrants whose religion is not one that is expressed in orthodox terms. Point 5 of the Motion raised this question.

IV.

The undisputed evidence is that the local board failed to have available an Advisor to Registrants and to have posted conspicuously or any place, the names and addresses of such advisor, as *then* mandatorily required by the Regulations, Section 1604.41.

The question presented is whether this violation of law alone, or in connection with other circumstances in evidence constituted a denied of due process. Point 10 of the Motion raised this point.

4. STATUTES AND REGULATIONS INVOLVED.

Article VI §3 of the United States Constitution is involved; also Amendments I and V.

Section 1 (c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) §451 (c)) is involved. Also, Section 6 (j) of the Act must be considered (50 U. S. C. App. (Supp. V) §456 (j), 65 Stat. 75, 83, 86), and §12 (a).

Sections 1604.41, 1626.25 and 1626.26 of the Regulations (32 C. F. R.) are involved.

All sections of the Act and of the Regulations, not set forth in the argument, are printed as Appendix D, below.

5. STATEMENT OF THE CASE

Appellant was indicted under U. S. C., Title 50, App. Sec. 462 (Universal Military Training and Service Act, for refusing to submit to induction. [R. 3]

Appellant pleaded Not Guilty, waived jury trial and was tried on November 23, 1954. [R. 5-6] Appellant was convicted on December 13, 1954 [R. 12] and sentenced on December 20, 1954. [R. 13]

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued, and denied [R. 7-8]; a Motion for New Trial was heard on December 20, 1954; it included a renewed and expanded Motion for Judgment of Acquittal and was supported by Appellant's Affidavit; these Motions also were denied. [R. 9-14]

Appellant was born on November 26, 1928. On October 6, 1948 he duly executed the eight-page Classification Questionnaire of the Selective Service System, for Local Board No. 99, claiming therein that he was a conscientious objector; [Ex. 10]* nevertheless, and contrary to the regulations, this local board did not send him the four-page Special Form for Conscientious Objectors, but classified him in Class I-A on October 12, 1948 [Ex. 11]. However, twenty months thereafter, on June 8, 1950, it did hand him said Special Form. [Ex. 11]. Appellant duly executed said Special Form.

When the local board retained him in Class I-A he appealed. Pursuant to the requirements of the law an F.B.I. investigation was made of his background, a hearing was held by a Hearing Officer of the Department of Justice who analyzed the evidence, and the file was sent to the Appeal Board, by the Department, with an adverse recommendation, on June 5, 1952. During said period, the practice of the Department was to also send the Appeal Board a copy of the Hearing Officer's analysis and advisory report to the Department. The Hearing Officer's report noted that appellant calls himself an agnostic and that the various churches he attended are not affiliated with any pacifist sect or teach pacifism. [Ex. 47-48]

When ordered to report for induction, appellant reported, but refused to submit to the induction ceremony.

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*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

When prosecuted, appellant won a judgment of dismissal on March 12, 1953. The trial judge made an *in camera* inspection of the FBI reports, and finding that they contained adverse material indicated he was going to admit them in evidence. Thereupon the United States Attorney announced he desired to dismiss the case. [R. 10-11, Ex. 111u]*

Appellant was thereafter reprocessed by the Selective Service System and was again denied a conscientious objector's classification. The exhibit reveals that on the second reprocessing, the United States Attorney deprived appellant of the usual FBI investigation of his *current* character and reputation (on the subject of his conscientious objections) and also deprived him of a hearing by a Hearing Officer of the Department of Justice (although the Appeal Board had requested that it be aided by such investigation and hearing [Ex. 126u] for the sole, given reason that appellant did not believe in a Supreme Being. [Ex. 127u]

When again ordered to report for induction appellant reported but refused to submit to induction. Thereupon he was indicted. [R. 3]

During the trial the Government introduced the selective service file and rested. The sole evidence in it that appellant had refused to submit to induction was (1) the letter from the inducting officer to the United States Attorney stating that "d. Registrant

*All pages of the Exhibit were repaginated, after Appellant's reprocessing by the Selective Service System. Pages with a "u" after the numbers are underscored, not circled, numbers.

did, on 8 January 1954, refuse to submit to induction because he claims to be a member of the First Unitarian Church of Los Angeles.

"e. Witnesses: The following officer and enlisted man of this organization witnessed the verbal refusal and signed statement of this registrant to submit to induction:

Earl S. Beydler, Captain, Inf.
George J. Newton, Jr.,
M/Sgt., U. S. Army" [Ex. 178u]

and (2) the selectee's written refusal which was as follows:

"January 8, 1954

"I refuse to be inducted into the Armed Forces of the United States.

/s/ Arthur P. Clark" [Ex. 179u]

During the trial a high selective service official testified there was no posting of names and addresses of Advisors to Registrants and in fact there were no Advisors to Registrants appointed. [R. 21]

6. REASONS FOR GRANTING THE WRIT.

I.

It is of importance to *all* persons that there be a clear line of demarcation between civilian status and military status.

Under the 1917 draft law every selective service registrant became subject to martial law upon the mailing to him, by the local board, of an Order to Report for Induction. In 1940 (and in all subsequent draft laws) Congress made clear that a civilian was to remain a civilian, and subject only to civil law penalties until the moment when he knowingly and voluntarily submitted to induction.

The induction ceremony (now covered by Special Regulation 615-180-1) is designed to provide a clear line of demarcation. Among its provisions is one expressly designed to give a hesitant, uncertain or recalcitrant "registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of $10,000 or both. *The regulation is couched in mandatory,* not discretionary language." (*Chernekoff vs. United States,* 219 F. 2d 721, 725; italics supplied).

The record is uncontradicted that the prosecution showed only that *one* chance to refuse induction was given to petitioner. Also, that he was never warned of the penal consequences of his refusal. Petitioner therefore submits that the record shows a failure of proof that is fatal to a verdict of guilty.

The Court of Appeals attempted to distinguish petitioner's case from the facts in its own *Chernekoff* (*supra*) decision. The only "distinguishing" fact *pointed out* by the Court of Appeals is in the sentence, "The *Chernekoff* statement was not *dated*" (slip opinion page 10). What significance this difference was supposed to have was not stated. It is submitted that it is an irrelevant difference.

II.

Another question presented is whether a registrant professing to be a conscientious objector may be summarily deprived of the "special" appellate procedures provided for such registrants by Congress. This deprivation was accomplished by non-appellate officials, ones who act on the belief that the registrant's professions "on their face" were not within the intent of Congress.

This question was partially considered by the Court in the case of *Davidson vs. United States,* 349 U.S. 918 wherein the Court remanded for a decision on a connected point. This Court has never directly decided the question.

It must not be overlooked that this petitioner's case is clearly distinguishable from Davidson's: Davidson did not perfect a second administrative appeal; nor was he entitled to one; petitioner Clark was entitled to one and therefore should have been given *all* the appellate procedures. Davidson merely asked for a postponement of induction (218 F. 2d 609, 611) and his

local board mistakenly started him on the road towards a second appeal; Clark concededly acted in a timely and suitable manner and, *as a matter of right* did perfect an appeal from the second adverse classification (see slip opinion of Ninth Circuit, page 9, decided June 20, 1956. Appendix A).

It is important that no intermediate official be permitted to "short-circuit" persons entitled to administrative appeals. This Court should put a stop to such officious practices.

III.

An important constitutional question involved and not yet decided is whether the innovation in the 1948 and 1951 laws, the so-called "Supreme Being Clause" offends the VIth Article (3rd clause) and/or the First Amendment.

Petitioner is personally affected by this clause in the Act and is in a position to raise this question for he informed the selective service system, on his classification questionnaire, that he didn't believe in a Supreme Being. The law requires that a registrant believe in a Supreme Being to qualify for a conscientious objector classification. [§6(j)] The Department of Justice recommended to the appeal board that petitioner be denied a conscientious objector classification because he didn't qualify under the law.

IV.

Another important question presented by this petition has not been determined by this Court but should be.

It is whether the failure to conspicuously post the names and addresses of Advisors to Registrants is alone a denial of due process.

It is undisputed that appellant's local board never complied with §1604.41 of the regulations (32 C.F.R.) either with respect to *posting* or even to *having* such officials.

> "ADVISORS TO REGISTRANTS
> "1604.41 APPOINTMENT AND DUTIES
>
> "Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service Law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants with the local board area shall be conspicuously posted in the local board office."

The failure to provide the registrant an essential protection, a protection specifically required by the regulation then in effect, results in a *jurisdictional* failure.

St. Joseph Stockyards vs. U. S., 298 U.S. 38;

Yamatoga vs. Fisher, 189 U.S. 86;
U. S. vs. Laier, 52 F. Supp. 392;
U. S. vs. Peterson, 53 F. Supp. 760;
U. S. ex rel. Bayly vs. Record, 51 F. Supp. 507, 515.

It is settled generally that due process within an administrative agency requires that those administering it strictly follow protective regulations.

On the other hand, if prejudice to petitioner need be shown by reason of the failure to have Advisors, the record in this case shows that it existed.

There are six separate items of prejudice to petitioner:

1) Petitioner presented no "new" evidence at his personal appearance before the board. The situation would have been vastly different if petitioner had consulted an attorney or had had an advisor because there is no conscientious objector who has received advice on the advisability of presenting "new or further evidence" at such a hearing who cannot recall additional incidents and facts of his life history that show his position on pacifism, the expressions he had made of his views, his religious training, his pacifist associates, their discussions, etc., etc., and who cannot secure some, more or better, testimonial affidavits, etc., etc., *if and after* he had advice on the necessity of such "new" evidence.

2) Petitioner didn't bring any witnesses to his local board hearing. An Advisor would have impressed him with the influence that certain types

of witnesses [ministers, for example] have on the board; petitioner, like all pacifists in Los Angeles, had available a number of eminent Los Angeles ministers who, in almost identical cases, have shown local boards that the views of its registrants, seen through their expert eyes truly represented "religious" views so that the board could recognize them as "within" the law.

Disavowals of belief in a Supreme Being are often semantic problems and sometimes mere sophomoric expression. Many a self-styled agnostic is rated a "believer" by experienced ministers of the liberal denominations.

3) At the hearing before the local board petitioner didn't avail himself of the several other opportunities granted to him by the regulations and by the court decisions that have construed the law and have definitely determined what constitutes a fair hearing. An Advisor would have informed him of his right to point out material in his file that he believed may not have been given sufficient weight and to explain and to discuss matters concerning which he believes the board seemed uncertain or unconvinced.

4) Petitioner never answered the adverse material in the Department's recommendation and the Hearing Officer's summary. An Advisor would have pointed out to the registrant the necessity of doing this at the hearing. That the registrant could have done so is shown by his affidavit [R. 10-11].

5) Petitioner on his second appeal, wasn't given the Hearing Officer hearing and the Attorney General's recommendation procedure. A good

Advisor would certainly have aided the registrant in this problem and the Department, out of an abundance of precaution might well have given the registrant the "full treatment" on the second round as it had given him the first, two years before. Many other agnostics have received the "full treatment" just as petitioner did on his first administrative appeal.

6) Prejudice to petitioner also exists by reason of the following: The regulations forbid a registrant to bring a lawyer with him to the hearing before the local board. 32 C.F.R. 1624 1 (b). Also see *United States vs. Pitt,* 3d Cir., 1944, 144 F. 2d 169; *Niznik vs. United States,* 6th Cir., 1949, 173 F. 2d 328, and *United States vs. Schwartz,* E.D. of N.Y. Cr. No. 43793, Dec. March 15, 1956. Since petitioner was refused the right to counsel before the board (to make a record on which he later is to face a felony charge) it was important *that he be advised* he could have the services of an advisor, this right being accorded him by the regulations themselves. The requirement of the *posting* is a vital requirement. Failure to post is not a harmless violation of the law. If the failure to give actual notice of violation of the law. If the failure to give actual notice of classification following personal appearance is a denial of due process (*United States vs. Fry,* 2d Cir., 1953, 203 F. 2d 638) the same reasoning declares the failure to give presumptive notice by posting is a denial of due process. Petitioner submits this is the import of *Chernekoff vs. United States,* 9th Cir., 1955, 219 F. 2d 721.

CONCLUSION

This petition should be granted for one or more of the four reasons herein stated.

Respectfully submitted,

J. B. TIETZ,
Counsel for Petitioner.

August, 1956.